Supreme Court, U.S.
FILED
951934 MAY 28 1996
OFFICE OF THE CLERK

No._____

In the

Supreme Court of the United States

October Term, 1995

Christ Theodosopoulos,

Petitioner,

v.

United States of America,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Adam Bourgeois
Attorney for Petitioner
53 West Jackson Boulevard
Suite 1524
Chicago, IL 60604
(312) 663-1279

6 PD

QUESTIONS PRESENTED

1. Whether a district court can conclude that the government did not carry its burden of proof and that the evidence supporting the scope of a defendant's conspiratorial agreement was speculative and still impose a sentence based upon the government's proposed drug quantity.

2. Whether, in the context of drug quantity determinations, an appellate court should make factual decisions about quantity as opposed to remanding the case for further consideration by the district court. This question is conceptually identical to cases now pending before this Court in a departure context. *Koon v. United States*, Case No. 94-1664 and *Powell v. United States*, Case No. 94-8842.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS AND ORDER BELOW	1
JURISDICTION	1
STATUTES AND SENTENCING GUIDELINES INVOLVED	1
STATEMENT OF THE CASE	2
A. Statement of the facts	
1. The Charged Conduct	2
2. The Motion for Judgment of Acquittal	4
3. The First Appeal	4
4. The Sentencing	5
B. Decision of the Court Below	6

REASONS FOR GRANTING THE WRIT

A. This Case Raises Important Questions About How Drug Quantities Should Be Computed Under The Sentencing Guidelines in Conspiracy Cases. Because the Issues in this Case Involve Recurring Determinations Made by Lower Federal Courts, Those Issues Are Appropriate for Certiorari Review.

B. This Case is Illustrative of the Confusion Regarding the Relative Roles of the District and Appellate Courts in the Federal Sentencing Process. This Case Presents the Same Issues as a Case Already Before this Court, Thus Making This Case Appropriate for Review.

CONCLUSION

TABLE OF AUTHORITIES

Cases	Page
Koon v. United States, Case No. 94-1664, U.S. Sup. Ct.	10
Nichols v. United States, 114 S. Ct. 1921 (1994)	9
Powell v. United States, Case No. 8842, U.S. Sup. Ct.	10
Townsen v. Burke, 334 U.S. 736 (1948)	9
United States v. Adams, 1 F.3d 1566 (11th Cir. 1993)	7
United States v. Arias-Villaneuva, 998 F.2d 1491 (9th Cir. 1993)	7
United States v. Banks, 10 F.3d 1044 (4th Cir. 1993)	7
United States v. Canoy, 38 F.3d 893 (7th Cir. 1994)	10
United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994)	7
United States v. Castellone, 985 F.2d 21 (1st Cir. 1993)	7
United States v. Davis, 981 F.2d 906 (6th Cir. 1992)	8
United States v. DePriest, 6 F.3d 1201 (7th Cir. 1993)	7
United States v. Ferguson, 23 F.3d 135 (6th Cir. 1994)	7
United States v. Garrido, 995 F. 2d 808 (8th Cir. 1993)	7
United States v. Hendrickson, 26 F.3d 321 (2d Cir. 1994)	12

United States v. Johnson, 997 F.2d 248 (7th Cir. 1993) 9

United States v. Koon, 34 F.3d 1416 (9th Cir. 1995) 10

United States v. Koon, 45 F.3d 1303 (9th Cir. 1995) (en banc) 10

United States v. Legarda, 17 F.3d 496 (1st Cir. 1994) 12

United States v. Miele, 989 F.2d 659 (3rd Cir. 1993) 9

United States v. Olano, 113 S. Ct. 1770 (1993) 11

United States v. Pico, 2 F.3d 472 (2d Cir. 1993) 7

United States v. Porter, 23 F.3d 1274 (7th Cir. 1994) 9

United States v. Powell, 34 F.3d 1416 (9th Cir. 1995)

United States v. Powell, 45 F.3d 1303 (9th Cir. 1995)

United States v. Price, 13 F.3d 711 (3d Cir. 1994) 7

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994) 9

United States v. Reed, 1 F.3d 1105 (10th Cir. 1993) 7

United States v. Rivera, 994 F. 2d 942 (1st Cir. 1993) 10

United States v. Saro, 24 F.3d 283 (D.C. Cir. 1994) 7

United States v. Villasenor, 977 F.2d 331 (7th Cir. 1992) 9

United States v. Williams, 10 F.3d 910 (1st Cir. 1993) 9

Guidelines
U.S.S.G. 1B1.3 (a)
U.S.S.G. 2D1.1 (a) (3)

Statutes
18 U.S.C. 3742 (e)

PETITION FOR WRIT OF CERTIORARI

Christ Theodosopoulos respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

There were two appeals in this case. The first appeal was reported at 48 F.3d 1438 and is reprinted at App. A1-A2 and B1-B38. The government was the appellant in that appeal, appealing an order directing a judgment of acquittal. The issue was sufficiency of the evidence, and the Seventh Circuit Court of Appeals reversed the trial court and remanded for re-sentencing. On August 22, 1995, the petitioner was sentenced to 60 months in the custody of the attorney general. A copy of the judgment and commitment order is reprinted at App. D1-D4. A copy of a relevant portion of the sentencing transcript is reprinted at App. C1-C2. The second appeal which is the subject of this opinion is unpublished and is reprinted at App. A1-A2.

JURISDICTION

The court of appeals issued its opinion on February 27, 1996. Judgment was entered on February 28, 1996. A copy of the entry of judgment is reprinted at App. E. This petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

SENTENCING GUIDELINES INVOLVED

This case involves the application of the United States Sentencing Guidelines to the facts of this case. U.S.S.G. 1B1.3 (a); 2D1.1 (a) (3). These guideline sections are set out verbatim:

U.S.S.G. 1B1.3 (a)

Chapters Two (Offense Conduct) and Three (Adjustments). Unless other specified, (I) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

U.S.S.G. 2D1.1 (a) (3)

(a) Base Offense Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection © below.

18 U.S.C. Omitted

STATEMENT OF THE CASE

A. Statement of the Facts

1. The Charged Conduct

On March 30, 1993, a confidential informant introduced an undercover DEA agent to a man named Khadir Ghanayem. (1441) Between April 22, 1993 and May 20, 1993, Ghanayem and the agent had a number of discussions about a deal where the agent would supply cocaine to Ghanayem and others associated with Ghanayem. (App. at B13) No deals occurred. (App. at B13).

On May 20, 1993, Ghanayem paged the agent who thereafter went to the auto body shop where Ghanayem worked. (App. at B14) When the agent arrived at the body shop, a man named Mazen Shunnarah was there. (App. B14). Ghanayem, Shunnarah, and the agent drove around and discussed a possible drug deal. (App. B15). The parties agreed on a price of $21,000 per kilogram. (App. B15).

At 8:30 that evening, the agents showed up at an agreed meeting place with five kilograms of cocaine. (App. B15). It soon became apparent that neither Ghanayem or Shunnarah had any money. (App. B15). The three men agreed to go to a body shop in a Chicago suburb to meet with a supposed source for the money. (App. B15).

When the trio arrived at the body shop, a number of men were there. (App. B15). Shunnarah pointed to a man he called "Chris" and indicated that Chris would not provide the money for a single kilogram of cocaine until Chris could personally see the cocaine. (App. B15). Chris was eventually identified as the petitioner, Christ Theodosopoulos. (App. B15, n.1).

The agent refused to do business on that basis and left the shop without talking to the petitioner. (App. B15). Shunnarah attempted to placate the agent by telling the agent that Shunnarah would go to Kentucky and get enough money to buy the cocaine himself. (App. B15).

On May 22, 1993, Ghanayem called the agent and indicated that Ghanayem was ready to do the deal. (App. B16). On May 23, 1993, Ghanayem, Shunnarah and the agent met at a parking lot located in the city of Chicago. (App. B16). The agent

was told that Chris was still sleeping and that they were having trouble waking Chris up. (App. B16).

Ghanayem and Shunnarah left the agent, but they were surveilled going to a garage located behind the petitioner's residence. (App. B16). The surveiling agents observed Ghanayem and Shunnarah talk to a number of people, including a man who matched the petitioner's general physical description. (App. B16).

Early that same afternoon, Shunnarah paged the agent and said that a deal for three kilograms of cocaine could now be completed. (App.B16). When the agent arrived at the parking lot which the parties had specified, the agent recognized Shunnarah's car. (App.B16). The agent pulled up next to Shunnarah's vehicle and asked to see the money. (App.B16). The agent testified that the petitioner was sitting in the passenger seat. (App.B16). According to the agent, the petitioner waved a wad of what appeared to be money at the agent. (App.B16). The appellant left the scene without having any contact with the agent. (App.B17).

Shunnarah asked for the cocaine, but the agents refused unless the "money man" returned with the money. (App.B17). Shunnarah refused and again said that he would go to Kentucky to get his own money with which to do the deal. (App.B17).

The petitioner was charged with conspiracy to possess cocaine with the intent to distribute and with an attempt to possess cocaine. (App.B17). Following trial, the petitioner was convicted on the conspiracy count.

2. The Motion for Judgment of Acquittal

The defense made a motion for a judgment of acquittal which was granted by the district judge. (App.B13). The government appealed that determination to the United States Court of Appeals for the Seventh Circuit. (App.B13).

3. The First Appeal

The Seventh Circuit reversed the acquittal, reinstated the

jury verdict, and remanded for re-sentencing. *United States v. Theodosopoulos*, 48 F.3d 1438 (7th Cir. 1995); (1452). In deciding that there was sufficient evidence for a rational jury to convict, the Seventh Circuit relied upon the following factors: (1450-1451).

1. The petitioner was present at a suburban body shop on May 20, 1993, at a time set for a cocaine transaction to occur;
2. The petitioner was present on two separate occasions on May 23, 1993, the revised date for the cocaine transaction, in that he was observed talking to his alleged co-conspirators in an alley behind his residence and in that he was observed at a parking lot where the transaction was supposedly to occur;
3. On all occasions, it was apparent that Shunnarah and Ghanayem did not have the money necessary to purchase the cocaine and that someone else was the money man for the transaction;
4. Waving the money at the agent established that the petitioner was the money man;
5. All of the petitioner's appearances were at critical junctures in the transaction and those repeated appearances belied any claim that the petitioner was simply a man in the wrong place at the wrong time; and
6. There were phone records which indicated that calls were made from a cellular phone associated with Ghanayem and Shunnarah to a telephone number assigned to the residence where the petitioner was then living.

4. The Sentencing.

On August 22, 1995, the petitioner was sentenced to 60

months in prison. App. at C. The sentence was based, in part, upon a determination that the petition was involved with the financing of the three kilograms of cocaine that was the subject of the events on May 23, 1993. App. at Appendix C1-C2..

B. The Decision of the Court Below

The Seventh Circuit Court of Appeals affirmed Petitioner's sentence in an unpublished opinion. App. at Appendix A1-A2. The Court rejected the petitioner's argument that the district judge had committed both clear and plain error when that judge, on the one hand, had concluded that the government had not proven the quantity by preponderance of the evidence but, on the other hand, held the petitioner responsible for the quantity advocated by the government. The Court refused to remand for further proceedings, but instead substituted its judgment for that of the district judge and concluded that the petitioner must be responsible for at least the amount of drugs [500 grams] which would trigger the mandatory minimum sentence which the petitioner had received. Appendix at pp.A2.

Reasons for Granting the Writ

A. This Case Raises Important Questions About How Drug Quantities Should Be Computed Under the Sentencing Guidelines in Conspiracy Cases. Because the Issues in this Case Involve Recurring Determinations Made by Lower Federal Courts, Those Issues Are Appropriate for Certiorari Review.

The sentencing guideline computation for drug defendants is directly related to the amount of drugs which is attributable to those defendants. U.S.S.G. 2D1.1 (a) (3). In a conspiracy, each conspirator is responsible for his or her own acts and the reasonably foreseeable acts undertaken by other co-conspirators. U.S.S.G. 1B1.3 (a).

Federal appellate and district courts constantly wrestle with the computation of drug quantities in a conspiratorial situation because the roles and agreements of each individual conspirator differ. For this reason, it is important that the lower courts be given guidance as to how drug quantities should be computed with respect to the members of a drug conspiracy. The recurring nature of these issues justify this Court's review. *See, e.g.* , *United States v. Saro*, 24 F.3d 283 (D.C. Cir. 1994) (were drugs used to sentence the defendant in furtherance of the conspiracy); *United States v. Castellone*, 985 F.2d 21 (1st Cir. 1993) (whether the defendant could foresee a particular drug transaction attributed to him); *United States v. Pico*, 2 F.3d 472 (2d Cir. 1993) (whether the defendant could foresee the amount of drugs dealt by other members of the conspiracy); *United States v. Price*, 13 F.3d 711 (3rd Cir. 1994) (individualized analysis required for each member of the conspiracy); *United States v. Banks*, 10 F.3d 1044 (4th Cir. 1993) (the scope of each conspirator's agreement must be analyzed when determining the amount of drugs to be attributed any particular defendant); *United States v. Carreon*, 11 F.3d 1225 (5th Cir. 1994) (whether a defendant is responsible for conduct which occurred before the defendant joined the conspiracy); *United States v. Ferguson*, 23 F.3d 135 (6th Cir. 1994) (whether individualized findings were made regarding each defendant's conduct); *United States v. DePriest*, 6 F.3d 1201 (7th Cir.1993) (remand required when district court did not explain why defendant should be held responsible for the entire amount of drugs involved in the conspiracy); *United States v. Garrido*, 995 F.2d 808 (8th Cir 1993) (whether drugs seized at the defendant's house were part of the conspiratorial agreement); *United States v. Arias-Villaneuva*, 998 F.2d 1491 (9th Cir. 1993) (whether district court properly determined each conspirator's agreement when determining drug quantities); *United States v. Reed*, 1 F.3d 1105 (10th Cir. 1993) (whether the district court's quantity computation was consistent with the scope of the defendant's conspiratorial agreement); *United States v. Adams*, 1 F.3d 1566 (11th Cir. 1993) (district court

can't speculate about a defendant's involvement in a drug conspiracy when establishing drug quantities).

There are two other reasons why certiorari should be granted in this case.

In the first instance, the Seventh Circuit's decision conflicts with the cases cited *supra* and further conflicts with other decisions within that particular Circuit. Specifically, there was absolutely no evidence about the scope of the petitioner's conspiratorial agreement. The evidence only showed that he was present at critical times, that other conspirators characterized the petitioner as the money man, and that during the last transaction, he waved what an agent believed to be money at the agent as the petitioner left the scene.

The evidence also showed that the petitioner never participated in any negotiations with the agent and that despite numerous contrary representations by his alleged co-conspirators, he never produced any money whatsoever to purchase the drugs from the agents. To say the least, his departure from the scene of the supposed drug deal was curious and strongly suggests that his conspiratorial agreement, if any, was very limited.

All of the cited cases hold that a district judge must make an individualized finding as to each conspirator's agreement and make the quantity attribution based upon that particularized finding. The cases also hold that a district court should not speculate about that agreement and that the sentence should only be based upon reliable information.

United States v. Davis, 981 F.2d 906 (6th Cir. 1992) is instructive in this regard. In *Davis*, the defendant was convicted of being a member of the conspiracy. Her role was to transport drugs from one location to another. The district judge was troubled, however, because there was absolutely no evidence which established the scope of her agreement or the amount of drugs with which she had been involved. The district judge resolved the dilemma by selecting the lowest possible guideline range for

cocaine. On appeal, the Sixth Circuit found that this approach was not clearly erroneous.

In this case, the appellate court erred because it speculated about the drug quantities and about the scope of the petitioner's conspiratorial agreement. Its decision is at odds with the holdings cited *supra*, and this error justifies review by this Court.

A final reason to grant review is based upon the fact that the appellate court did not remand the case to the district court for further review even though it was apparent that the district court did not follow the dictates of the guidelines and the cases when it established the amount of drugs attributable to the defendant.

Specifically:

The cases are legion which hold that the government has the burden of proving drug quantities by a preponderance of the evidence. *See, e.g., Nichols v. United States*, 114 S. Ct. 1921 (1994); *United States v. Pugh*, 25 F.3d 669 (8th Cir. 1994); *United States v. Porter*, 23 F.3d 1274 (7th Cir. 1994); *United States v. Villasenor*, 977 F.2d 331 (7th Cir. 1992).

The cases are also clear that the information used to sentence an individual must be reliable and not speculative. *See, e.g., Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Williams*, 10 F.3d 910 (1st Cir. 1993); *United States v. Miele*, 989 F.2d 659 (3rd Cir. 1993); *United States v. Johnson*, 997 F.2d 248 (7th Cir. 1993).

Here, the district judge specifically noted that the information used to determine quantity was speculative and not sufficient to pass the preponderance of the evidence test. App. at ***. Having reached this conclusion, it was both clear and plain error for the district judge to nevertheless adopt the government's recommended quantity for sentencing. It was also error, a violation of due process, and a decision inconsistent with the great weight of authority for the Seventh Circuit to refuse a remand so that the proper procedures could be followed by the district judge at sentencing.

All of these reasons support issuance of the writ, and the petitioner respectfully asks this Court to grant his petition.

B. This case is Illustrative of the Confusion Regarding the Relative Roles of the District and Appellate Courts in the Federal Sentencing Process. This Case Presents the Same Issues as a Case Already Before this Court, thus Making this Case Appropriate for Review.

Koon v. United States, Case No. 94-1664, and *Powell v. United States*, Case No. 94-8842 are presently before this Court awaiting decision.

Koon and Powell were Los Angeles Police Officers who were involved in the heavily publicized Rodney King episode. The district judge departed downward for a variety of reasons when the sentence was imposed. On appeal, the Ninth Circuit substituted its judgment for the judgment of the district judge and concluded that the facts of the case did not warrant any departure. *United States v. Koon and Powell*, 34 F.3d 1416 (9th Cir. 1995) and 45 F.3d 1303 (9th Cir. 1995) *(en banc)*.

This decision conflicted with a decision of the First Circuit in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). In *Rivera*, the First Circuit elaborated at length on the relative responsibilities under the guidelines of the Sentencing Commission, the district courts, and the courts of appeals. 994 F.2d at 945-52. As explained by *Rivera*, the courts of appeals play a limited role, and the district judge should be given the authority to decide whether the facts of any given case are sufficiently unusual to warrant a departure. As long as the district judge acted reasonably, the appellate court should not substitute its judgment for the judgment of the district judge. Legal issues would still be reviewed *de novo*.

The *Rivera* analysis comports with 18 U.S.C. 3742 (e) which states that appellate courts should review a district judge's factual determinations at sentencing for clear error. *See, also, United States v. Canoy*, 38 F.3d 893, 908 (7th Cir.1994) ("when a

district court clearly explains the basis for its findings..., that finding is entitled to considerable respect of appeal").

Petitioner's case presents a similar question in the context of the quantities of drugs that should be used to establish the sentence of each individual conspirator.

The sequence of events is important:

a. The focus at sentencing was upon the last attempted drug deal which involved 3 kilograms of cocaine.

b. Although the petitioner did not challenge the drug quantity at sentencing, the district judge, in the context of a discussion about a role adjustment, made the following statements: App. at C.

> I mean, [petitioner] certainly was merely present in some suspicious places, but there wasn't any evidence to suggest that he knew the scope [of the conspiracy] or the amount [of drugs] there was. According to the Seventh Circuit opinion, and according to my recollection of the evidence, the most serious item was the agent's observation of what he thought was money being flashed by [petitioner] as he drove out of the parking lot. Again, is that probative of his knowledge of what was going on in terms of how much was being negotiated and what was being negotiated and what the terms and conditions were? **I think we are left in a position of speculation and not proof by a preponderance of the evidence. (emphasis supplied).**

Despite these comments, the district judge based the petitioner's sentence on the 3 kilogram quantity.

On appeal, the petitioner argued that the district's judge's comments were completely inconsistent with her decision to base the petitioner's sentence upon 3 kilograms of cocaine. The petitioner argued that the district judge had committed both clear

and plain error[1] and asked the Seventh Circuit to remand the case to the district court so that the quantity issue could be further ventilated.

The Seventh Circuit rejected that request and made the factual decision itself, stating that in its view, the petitioner was responsible for at least 500 grams of cocaine. Since that quantity triggered a mandatory five year sentence and since petitioner's sentence was five years, the appellate court concluded that there was no need for any further hearing on the subject.

Petitioner believes that the appellate court erred when it made this determination.

In the first instance, there are scenarios where the district court could have concluded that less than 500 grams should be attributed to the petitioner. For example, Application Note 12 to U.S.S.G. 2D1.1 indicates that if a defendant did not intend or is not capable of producing the amount of drugs under negotiation, the amount that the defendant did intend or was capable of producing should be used.

In the instant case, the issue was about money. Every discussion and/or negotiation failed because the conspirators could not produce the money required to purchase the drugs.

In the transaction at issue, the petitioner was at the parking lot where the deal was to occur and waved what the agent thought might be money as he left the scene. However, no one knew how much money, if any, was waved, and the petitioner's departure suggests that money for the deal was not available.

Thus, the district court could have concluded that some lesser quantity should be attributed to the petitioner, and the appellate court erred when it refused to return the case to the lower court. *See, e.g. United States v. Hendrickson*, 26 F.3d 321 (2d Cir.1994) (government has burden to establish the amount of drugs which the defendant intended to deal); *United States v. Legarda*,

---

[1] Since there was no objection to the drug quantity at sentencing, the standard of review is for plain error. *See, e.g., United States v. Olano,* 133 S. Ct. 1770 (1993)

17 F. 3d 496 (1st Cir. 1994) (same); *United States v. Davis*, 981 F.2d 906 (6th Cir. 1992) (when there was no factual basis to establish the amount of drugs attributable to the defendant, it was not clearly erroneous for the district judge to select the lowest offense level applicable to the offense).

Moreover, the district court should have been given the opportunity to resolve a factual question, and the appellate could should not have usurped the district judge's fact-finding role.

For this reason, this case presents the same issue as *Powell* and *Koon* because it squarely raises the question of the relative responsibilities of district and appellate courts in the sentencing process.

As the petitioners argued in *Powell* and *Koon*, it is the district judge who is most familiar with the facts of the case, and it is the district judge who should be permitted to make factual determinations. An appellate court does not have the same feel for the factual part of the case as does the district judge and, for that reason, the appellate court should not substitute its judgment for the district judge unless the district judge acted in an unreasonable fashion.

Here, the district judge committed plain error when she concluded that the government had not proven any quantity by preponderance of the evidence but still sentenced the petitioner based upon the amount of drugs which the government advocated.

The appellate court's refusal to remand for further factual findings upset the delicate balance between district and appellate courts in the federal sentencing process.

Since this issue is conceptually identical to the issue raised in *Powell* and *Koon* and since this issue is presented on virtually a daily basis to the federal courts, it is an important question which would justify the writ of certiorari which this petition seeks.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary considerations .

May 28, 1996

Respectfully submitted,

Adam Bourgeois
53 West Jackson Boulevard
Suite 1524
Chicago, IL 60604
(312) 663-1279

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRIST THEODOSOPOULOS,
Defendant-Appellant.

No. 95-3115

United States Court of Appeals, Seventh Circuit
Submitted February 6, 1996*
February 27, 1996

ORDER

Before JOEL M. FLAUM, FRANK H. EASTERBROOK, Circuit Judges; and JAMES C. PAINE, District Judge**.

A jury convicted Theodosopoulos of conspiring to possess cocaine, with intent to distribute it. The district court then entered a judgment of acquittal, holding that the evidence is insufficient to support the verdict. We reversed in turn after concluding that a rational jury could have found Theodosopoulos guilty beyond a reasonable doubt. 48 F.3d 1438 (7th Cir. 1995). On remand the district court sentenced Theodosopoulos to serve the minimum possible sentence: 60 months' imprisonment under 21 U.S.C. §841 (b) (1) (B). From this judgment Theodosopoulos now appeals.

---

* An earlier appeal was argued orally. This successive appeal has been assigned to the original panel under Internal Operating Procedure 6(b), and the judges have unanimously concluded that a second oral argument would not be helpful to the court.

** Of the Southern District of Florida, sitting by designation.

One of his arguments challenges the verdict. He contends that the district court should have instructed the jury on withdrawal from a conspiracy. At the trial itself, however, after proposing a withdrawal instruction, counsel conceded that the record does not support such a theory of defense. There was no plain error -- the applicable standard, given the lack of objection. Theodosopoulos never lifted a finger to withdraw. Either he was in the conspiracy from beginning to end (the prosecutor's position) or he was never in the conspiracy (Theodosopoulos' position); there is no other option, and hence no need for an instruction.

The five-year minimum sentence applies to quantities of cocaine exceeding 500 grams. Theodosopoulos contends that the district judge committed plain error in computing the quantity at three kilograms. His argument is a rehash of his contention on the sufficiency of the evidence, which we rejected on the prior appeal. If Theodosopoulos was in the conspiracy at all, the quantity for which he is accountable exceeds 500 grams. Whether it is three kilograms or some other number is irrelevant, given the district judge's willingness to select the minimum sentence, provided the quantity exceeded 500 grams--which it did. The minimum conceivable quantity consistent with Theodosopoulos being guilty is one kilogram. Theodosopoulos does not argue that it was plain error (again the applicable standard) to find that the conspiracy encompassed 500 grams or more.

AFFIRMED

B1

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHRIST THEODOSOPOULOS
and Khadir Ghanayem,
Defendants-Appellees.

UNITED STATE OF AMERICA,
Plaintiff-Appellant,

v.

KHADIR GHANAYEM,
Defendant-Appellant.

Nos. 93-3831, 94-1384 and 94-2417.

United States Court of Appeals, Seventh Circuit.

Argued January 9, 1995
Decided February 28, 1995.
Rehearing and Suggestion for Rehearing En Banc
Denied April 18, 1995.

Defendants who were convicted by jury of conspiracy to possess with intent to distribute cocaine moved for judgment of acquittal. The United States District Court for the Northern District of Illinois, Suzanne B. Conlon, J., 845 F.Supp. 556, granted motion, concluding that government had entrapped one defendant and failed to prove that other defendant was knowing participant in conspiracy. Government appealed judgment of acquittal, and defendant appealed denial of this motion for new trial. The Court of Appeals, Flaum, Circuit Judge, held that: (1)

defendant was predisposed to being involved in drug transaction, preventing him from claiming entrapment; (2) participant's testimony was not newly discovered evidence entitling defendant to new trial; and (3) defendant was knowing and active participant in conspiracy.

Affirmed in part, reversed in part, and remanded for sentencing.

1. Criminal Law k569
   110 -----
   110XVII Evidence
   110XVII (V) Weight and Sufficiency
   110k569 Defenses in general.

C.A.7 (Ill.) 1995

Evidence was sufficient to permit jury to find beyond reasonable doubt that defendant had requisite predisposition to engage in drug transaction, precluding him from claiming defense of entrapment, though government approached defendant and suggested drug deal, where defendant had previous marijuana conviction, he insisted on $1,000 per kilogram sold to informant, indicating that he was aware of range of broker's fees for bringing together supplier and distributor of cocaine, defendant did not abandon transaction when it encountered trouble, remaining enthusiastic and active participant in conspiracy, and government did not threaten, intimidate or coerce him into transaction.

2. CRIMINAL LAW K1134 (8)
   110 -----
   110XXIV Review
   110XXIV(L) Scope of Review in General

C.A.7 (Ill.) 1995
   110k1134 Scope and Extent in General
   110k1134(B) Nature of decision appealed from as

B3

affecting scope of review

C.A.7 (Ill.) 1995

Standard of appellate review of trial court's postverdict judgment of acquittal is same as that as that applied by trial court.

3. CRIMINAL LAW k1159.2(7)

110	------
110XXIV	Review
110XXIV(P)	Verdicts
110k1159	Conclusiveness of Verdict
110k1159.2	Weight of Evidence in General
110k1159.2(7)	Reasonable doubt.

C.A.7 (Ill.) 1995

Test for appellate review of trial court's postverdict judgment of acquittal is whether record contained sufficient evidence from which jury could reasonably find defendant guilty beyond reasonable doubt.

4. CRIMINAL LAW k330

110	-----
110XVII	Evidence
110XVII©	Burden of Proof
110k326	Burden of Proof
110k330	Matters of defense and rebuttal in general.

[see headnote text below]

4. CRIMINAL LAW k569

110	------
110XVII	Evidence
110XVII(V)	Weight and Sufficiency
110k569	Defenses in general.

C.A.7 (Ill.) 1995

In entrapment cases, government must prove beyond reasonable doubt that defendant who raised colorable defense of entrapment has not in fact been entrapped.

5. CRIMINAL LAW k37(2.1)

110	------
110II	Defenses in General
110k36.5	Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37	Entrapment
110k37(2)	What Constitutes Entrapment
110k37(2.1)	In General.

C.A.7 (Ill.) 1995

Elements of defense of "entrapment" are government inducement of crime, and lack of predisposition on part of defendant to engage in criminal conduct.

See publication Words and Phrases for other judicial constructions and definitions.

6. CRIMINAL LAW k37(4)

110	-------
110II	Defenses in General
110k36.5	Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37	Entrapment
110k37(2)	What Constitutes Entrapment
110k37(4)	Previous innocence or criminal disposition of accused.

C.A.7 (Ill.) 1995

Lack of predisposition is principal element of entrapment defense.

7. CRIMINAL LAW k330

110	-------
110XVII	Evidence
110XVII ©	Burden of Proof
110k326	Burden of Proof
110k330	Matters of defense and rebuttal in general.

[See headnote text below]

7. CRIMINAL LAW k569

110	------
110XVII	Evidence
110XVII(V)	weight and Sufficiency
110k569	Defenses in general.

C.A.7 (Ill.) 1995

Once defendant presents sufficient evidence tending to show that government induced him to break law, burden shifts to government to prove beyond reasonable doubt that defendant was disposed to commit crime before being approached by government agents.

8. CRIMINAL LAW k37(4)

110	------
110II	Defenses in General
110k36.5	Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37	Entrapment
110k37(2)	What Constitutes Entrapment
110k37(4)	Previous innocence or criminal disposition of accused.

C.A.7 (Ill.) 1995

Whether defendant had predisposition to commit charged offense for purposes of entrapment defense depends on following factors: (1) character or reputation of defendant; (2) whether suggestion of criminal activity was originally made by

government; (3) whether defendant was engaged in criminal activity for profit; (4) whether defendant evidenced reluctance to commit offense, overcome by government persuasion, and (5) nature of inducement or persuasion offered by government.

9. CRIMINAL LAW k37(4)

110	--------
110II	Defenses in General
110k36.5	Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37	Entrapment
110k37(2)	What Constitutes Entrapment
110k37(4)	Previous innocence or criminal disposition of accused.

C.A.7 (Ill.) 1995

Most important factor in determining defendant's predisposition to commit offense for purposed of entrapment defenses is whether defendant exhibited reluctance to commit offense that government agents overcame.

10. CRIMINAL LAW k37(4)

110	--------
110II	Defenses in General
110k36.5	Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37	Entrapment
110k37(2)	What Constitutes Entrapment
110k37(3)	Originating intent; furnishing opportunity or facilities.

C.A.7 (Ill.) 1995

Mere solicitation by government agent is insufficient to establish entrapment.

11. CRIMINAL LAW k938(3)

110	--------
110XXI	Motions for New Trial
110k937	Newly Discovered Evidence
110k938	In General
110k938(3)	Facts within knowledge of defendant

11. CRIMINAL LAW k939(2)

110	--------
110XXI	Motions for New Trial
110k937	Newly Discovered Evidence
110k939	Diligence
110k939(2)	In procuring absent witnesses.

C.A.7 (Ill.) 1995.

Testimony of participant in drug transaction was not newly discovered evidence on defendant's claim of entrapment, so as to justify new trial, where defendant and his counsel knew substance of participant's testimony during trial, and, instead of exercising due diligence to secure testimony, defendant chose strategy of obtaining missing witness instruction and then arguing to jury substance of missing testimony. Fed. Rules Cr. Proc. Rule 33, 18 U.S.C.A.

12. CRIMINAL LAW k938 (1)

110	--------
110XXI	Motions for New Trial
110k937	Newly Discovered Evidence
110K938	In General
110k938(1)	In general.

C.A.7 (Ill.) 1995.

To justify new trial based on newly discovered evidence, defendant must show that evidence came to his knowledge only after trial, could not have been discovered sooner through exercise of due diligence, is material, and not merely impeaching or

cumulative, and would probably lead to acquittal in event of new trial. Fed. Rules Cr. Proc. Rule 33, 18 U.S.C.A.

13. CONSPIRACY k47(12)

91	---
91II	Criminal Responsibility
91II (B)	Prosecution
91k44	Evidence
91K47	Weight and Sufficiency
91k47(3)	Particular Conspiracies
91K47(12)	Narcotics and dangerous drugs.

C.A.7 (Ill.) 1995.

Evidence was sufficient to support rational jury's conclusion that beyond reasonable doubt defendant conspired to possess cocaine with intent to distribute it, where defendant was present at time set for first planned exchange of money and cocaine, defendant met and spoke with two other participants in transaction just before planned meeting with undercover agent to give him money, and defendant waved money at agent, which appeared to be intended to show suppliers that money was present for narcotics deal to be completed.

14. CRIMINAL LAW k1144.13(3)

110	---
110XXIV	Review
110XXIV(M)	Presumptions
110k1144	Facts or Proceedings Not Shown by Record
110k1144.13	Sufficiency of evidence
110k1144.13(2)	Construction of Evidence
110k1144.13(3)	Construction in favor of government, state, or prosecution.

[See headnote text below]

14. CRIMINAL LAW k1159.2(7)

110	--------
110XXIV	Review
110XXIV(P)	Verdicts
110k1159	Conclusiveness of Verdict
110k1159.2	Weight of Evidence in General
110k1159.2(7)	Reasonable doubt.

C.A.7 (Ill.) 1995.

In examining sufficiency of evidence claim, court reviews record in light most favorable to government and determines whether any rational trier of fact could have found essential elements of crime beyond reasonable doubt.

15. CRIMINAL LAW k1144.13(4)

110	--------
110XXIV	Review
110XXIV(M)	Presumptions
110k1144	Facts or Proceedings Not Shown by Record
110k1144.13	Sufficiency of Evidence
110k1144.13(4)	Evidence accepted as true.

[See headnote text below]

15. CRIMINAL LAW k1144.13(6)

110	--------
110XXIV	Review
110XXIV(M)	Presumptions
110k1144	Facts or Proceedings Not Shown by Record
110k1144.13	Sufficiency of Evidence
110k1144.13(6)	Evidence considered; conflicting evidence.

C.A.7 (Ill.) 1995.

When reviewing conviction, Court of Appeals may accept any adequate evidence, including circumstantial evidence, as support for conviction.

16. CONSPIRACY k28(3)

91	---
91II	Criminal Responsibility
91II(A)	Offenses
91k28	Conspiracy to Commit Crime
91k28(3)	Particular crimes.

C.A.7 (Ill.) 1995.

To prove defendant guilty of drug conspiracy, government must prove beyond reasonable doubt that conspiracy existed, defendant knew of conspiratorial agreement, and defendant intended to join it.

17. CONSPIRACY k24.5

91	---
91II	Criminal Responsibility
91II(A)	Offenses
91k23	Nature and Elements of Criminal Conspiracy in General
91k24.5	Knowledge and intent.

C.A.7 (Ill.) 1995.

To prove that particular defendant was member of ongoing conspiracy, government must present substantial evidence that defendant knew of illegal objective of conspiracy and agreed to participate in its achievement.

18. Conspiracy k47(2)

91	---
91II	Criminal Responsibility
91II(B)	Prosecution

91k44	Evidence
91k47	Weight and Sufficiency
91k47(2)	Circumstantial evidence.

C.A.7 (Ill.) 1995

Although jury may not rest its verdict solely by piling inference upon inference, government may prove defendant's participatory link to conspiracy solely by way of circumstantial evidence.

19. Conspiracy k47(2)

91	--------
91II	Criminal Responsibility
91II(B)	Prosecution
91k44	Evidence
91k47	Weight and Sufficiency
91k47(2)	Circumstantial evidence.

C.A.7 (Ill.) 1995

While mere presence is not enough by itself to convict defendant, presence, along with other evidence indicating that presence or act was intended to advance ends of conspiracy, suffices.

20. CRIMINAL LAW k1159.2(2)

110	--------
110XXIV	Review
110XXIV(P)	Verdicts
110k1159	Conclusiveness of Verdict
110k1159.2	Weight of Evidence in General
110k1159.2(2)	Verdict unsupported by evidence or contrary to evidence.

[See headnote text below]

20. CRIMINAL LAW k1159.2(7)

110	---
110XXIV	Review
110XXIV(P)	Verdicts
110k1159	Conclusiveness of Verdict
110k1159.2	Weight of Evidence in General
110k1159.2(2)	Reasonable doubt.

C.A.7 (Ill.) 1995

Court of Appeals will take conviction away from jury on sufficiency grounds only when government has offered no evidence from which jury could conclude beyond reasonable doubt that crime had been committed.

Steven Shobat, Asst. U.S. Atty., Bennett Kaplan (argued), Office of U.S. Atty., Crim. Div., Barry Rand Elden, Asst. U.S. Atty., Crim. Receiving, Appellate Div., Chicago, IL for U.S.

Victor F. Ciardelli (argued), Peter J. Vilkelis, Chicago, IL, for Christ Theodosopoulos.

David S. Mejia (argued), Stephen K. Milott, Stephen K. Milott & Associates, Chicago, IL, for Khadir Ghanayem.

Before FLAUM and EASTERBROOK, Circuit Judges, and PAINE, (FN*) District Judge.

FLAUM, Circuit Judge.

A jury convicted defendants Khadir Ghanayem and Christ Theodosopoulos of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. Secs. 841(a)(1), 846, and 18 U.S.C. Sec 2. After trial, the district court granted both defendants' motions for judgment of acquittal pursuant to Fed.R.Crim. P. 29, concluding that the government had entrapped Ghanayem and had failed to prove that Theodosopoulos was a

knowing participant in the conspiracy. The district could also denied Ghanayem's motion for a new trial pursuant to Fed.R.Crim.P. 33. The government appeals the district court's judgment of acquittal and Ghanayem appeals the denial of his motion for a new trial. We now reverse the judgments of acquittal, affirm the denial of Ghanayem's new trial motion reinstate the jury verdicts, and remand for sentencing.

In March, 1993, as part of a Drug Enforcement Administration ("DEA") investigation, an individual cooperating with the DEA initially identified several people who were allegedly known drug dealers, and a location--the One, Two, Three Lounge in Chicago--where these persons congregated. On March 30, 1993, undercover DEA Special Agent William Grant and the informant went to this lounge and met defendant Khadir Ghanayem. The informant recognized Ghanayem as a cousin and drug associate of Mazen Shunnarah, one of the targets of the investigation. During the course of their conversation, Ghanayem handed the informant his business card and told him to contact him at work at George's Auto Shop ("George's") if he needed anything.

On April 22, 1993, the informant and Grant met Ghanayem at George's. Although Grant attempted to make an audio tape of the conversation, the recording was virtually inaudible. Grant testified that they first discussed replacing a windshield on Grant's Mercedes Benz. During the conversation, the informant asked Ghanayem if he was interested in "buying anything," apparently alluding to drugs. When Ghanayem asked what Grant had available, Grant responded that he had "five keys"--referring to five kilograms of cocaine. Grant testified that Ghanayem asked about the price and that Grant told Ghanayem that he could purchase cocaine for $20,000 per kilogram. Grant also testified that Ghanayem stated that he would call the informant the next day, although no such call was made. In

contrast to Grant's version of the events, Ghanayem testified that Grant brought up the cocaine and a potential deal, to which Ghanayem responded that he did not buy, sell, or do drugs.

The next contact occurred on May 7, 1993, when Grant again went to George's. Grant testified that along with discussing his car windshield, Ghanayem stated that he had not yet reached his cocaine contact, who he referred to as "Mazen." Grant gave Ghanayem his pager number and agreed on the code "111" for future contacts. Records indicate that calls were placed using Ghanayem's cellular telephone to Shunnarah's tavern in Lexington, Kentucky on May 11, 1993.

On May 12, 1993, Grant and Ghanayem met again at George's. Grant testified that Ghanayem informed him that he had a purchaser who wanted three kilograms of cocaine at $20,000 per kilogram. Grant also testified that when asked when his contact would be ready, Ghanayem made a long distance telephone call to area code 606--which includes Lexington--asked for "Mazen," and then had a brief conversation with Mazen Shunnarah. Ghanayem then told Grant that he (Ghanayem) would purchase one kilogram of cocaine, that Mazen would purchase three more, and that they would contact Grant when they were ready to make the purchase.

The next meeting between Ghanayem and Grant took place on May 17, 1993. After discussing arrangements for fixing the Mercedes Benz, Ghanayem informed Grant that he had been having trouble reaching his contact and that he would continue to try to call him. Ghanayem's cellular telephone records indicate that telephone calls were again placed to Shunnarah's tavern in Lexington on May 18, 1993. On the morning of May 20, 1993, Grant dropped off his car at the shop. He testified that later that afternoon Ghanayem paged him, using the agreed-upon "111" code. Grant testified that he returned to the auto shop, where he observed a light blue Audi, and met with Ghanayem and Shunnarah. Grant then testified that Ghanayem told him that he

did not want to be involved in the negotiations with Shunnarah but that he wanted Grant to add $1,000 to purchase price for him. Grant, Ghanayem and Shunnarah then drove around the area in Shunnarah's Audi, discussing Ghanayem's search for a consistent source of cocaine. Shunnarah and Grant agreed on a price of $21,000 per kilogram and on meeting at the auto shop to complete the deal.

Later that evening, Grant and Ghanayem changed the transaction meeting location to the Plush Pup restaurant at 8:30 p.m. Grant drove to the restaurant with Special Agent Bernie Bolf, who had brought the 5 kilograms of cocaine in the trunk of his car. Shunnarah told Grant that he had the money but that he first wanted to see the cocaine. Grant and Shunnarah walked to Bolf's trunk, where Shunnarah examined one of the kilogram packages of cocaine and concluded "that would be fine." Shunnarah told Grant that he would return in ten minutes with the money. While Grant and Ghanayem waited inside the restaurant for Shunnarah to return, they received a phone call from Shunnarah stating that the person with the money for the cocaine would not give him the money until he saw the cocaine. Grant, Ghanayem, and Shunnarah agreed that they would go to the A to Z Auto Body in River Grove where they could meet the money source.

At the Body Shop, Grant testified that he saw Shunnarah and fifteen unknown males. Grant indicated that Shunnarah told him that the purchaser of the cocaine, who he pointed to and identified as "Chris," would not deliver the $21,000 purchase money until he saw the cocaine. (FN1) Grant, saying that he did not do business that way, refused to show the cocaine, and left the shop. As Grant was leaving, Shunnarah approached him and told him that he would drive to Lexington and get his own money to purchase five kilograms of cocaine. The following day, Grant met with Ghanayem at George's to discuss the repair of Grant's windshield and paid Ghanayem $450 for the repairs. During that meeting, Grant testified that he complained about the dealings the previous evening.

On May 22, 1993, Ghanayem called Grant and told him that they were ready to complete the deal. Grant stated that he could not do it until the next day. The following day, May 23, (FN2) Ghanayem contacted Grant and told the agent to meet him in the parking lot of Chicago Billiards on Irving Park Road at 10:30 a.m. At approximately 11:00 a.m., Grant met Ghanayem and Shunnarah, who told the officer that he was having a difficult time waking up the individual with the money, who Shunnarah identified by the name "Chris." Telephone records from Ghanayem's cellular phone indicate that two one-minute calls were made to Theodosopoulos's residence at 11:46 a.m. and 12:13 p.m. A single call was placed at 12:30 p.m. from Theodosopoulos's phone to Ghanayem's cellular phone.

After this meeting, Ghanayem and Shunnarah drove from the parking lot to the Resurrection Hospital, where Ghanayem had a foreign object removed from his eye. Ghanayem and Shunnarah then drove to an alleyway, where they stopped at a garage behind Theodosopoulos's residence. Here, Special Agents Jeff Hall and William Krieg observed Ghanayem and Shunnarah speaking with a number of individuals, one of whom matched the physical description of Theodosopoulos. Ghanayem testified that he took each of these actions only after repeated pressure from Grant.

At approximately 1:00 p.m., Shunnarah paged Grant, told him that the individual with the money was ready to complete the deal and that they would once again meet him at the Chicago Billiards's parking lot. When Grant arrived, he observed Shunnarah's car (containing both Ghanayem and Shunnarah) parked next to a gray Nissan 300 ZX. Grant parked next to Ghanayem and asked to see the money. At that moment, the gray Nissan drove in front of Grant's car. Grant recognized the car's passenger as Theodosopoulos. Theodosopoulos held up a stack of money and waved it so Grant could see it. Theodosopoulos then drove out of the parking out and Shunnarah asked for the cocaine. Granted contracted undercover Agent Hall, who , upon arrival, asked Shunnarah to have his people return with the money so they could count it. Shunnarah refused and told Grant that he would

instead get his own money from Kentucky and purchase the cocaine himself.

Ghanayem and Theodosopoulos were subsequently arrested and charged in a two-count indictment for conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine. A jury trial began on October 13, 1993. At the close of the government's case, both defendants moved for directed findings of not guilty and judgments of acquittal. The district court denied both defendants' motions. Theodosopoulos then rested without testifying or presenting his evidence. Ghanayem presented a defense, including testifying on his own behalf.

After Ghanayem rested, he sought to enter into evidence a plea agreement between Shunnarah and the United States. Mazen Shunnarah had been indicted in Lexington, Kentucky and charged with conspiring to possess cocaine with intent to distribute. Pursuant to a written plea agreement with the United States Attorney's Office in Lexington, he had entered a guilty plea. Under the terms of this agreement, which did not expressly bind the United States Attorney's Office in the Northern District of Illinois, Shunnarah was obligated to cooperate with the United States. The government did not call Shunnarah as a witness in the trial. When Ghanayem called Shunnarah to the stand, however, Shunnarah exercised his Fifth Amendment right not to testify. The government informed the court that Shunnarah had made statements that were favorable to the defense-specifically, that Ghanayem had never been involved in a drug deal before. As a result, the court ordered a missing witness instruction. The court advised the jury: (1) that Shunnarah had entered a guilty plea in Lexington, Kentucky; (2) that he was obligated under the terms of that plea agreement to cooperate with the government and tell the truth; and (3) that Shunnarah was in the exclusive control of the government and that the failure to call Shunnarah to the witness stand permitted the jury to infer that his testimony would have

been unfavorable to the government. In his closing argument, Ghanayem argued that this inference to the jury and suggested that Shunnarah, the sole wrongdoer, would have exculpated Ghanayem. The defendants renewed their motions for judgments of acquittal at the close of all the evidence. The district court expressly reserved ruling on the motions, under Fed.R.Crim.P. 29, until after the jury reached verdicts.

On October 20, 1993, the jury found Ghanayem and Theodosopoulos not guilty of the attempt count and guilty of the conspiracy charge. The district court initially denied Ghanayem's oral motion for a new trial and for acquittal; after consideration of written motions, however, the district court granted Ghanayem's post-trial motion for acquittal under Fed.R.Crim.P. 29, United States v. Ghanayem, 845 F.Supp. 556 (N.D. Ill. 1994), on the ground that that government had entrapped Ghanayem. The government then filed a motion, pursuant to Fed.R.Crim.P. 29(d), seeking a conditional ruling on the pending motion for a new trial. Pursuant to the government's request, the district court denied Ghanayem's new trial motion, founded on the grounds of new evidence. The district court then also granted Theodosopoulos's motion for judgment of acquittal for lack of evidence, and set aside both jury verdicts.

The government now appeals both judgments of acquittal. Ghanayem challenges the district court's denial of his motion for a new trial.

II. Khadir Ghanayem

A.

[1][2][3] With regard to Ghanayem's directed judgment of acquittal, the government raises only one issue on appeal: the sufficiency of the evidence to support the jury's conclusion that Ghanayem was a knowing member of the charged conspiracy and

was not entrapped as a matter of law. The standard for appellate review of a trial court's post-verdict judgment of acquittal is the same as that applied by the trial court. United States v. Beck, 615 F.2d 441 (7th Cir. 1980); see United States v. Brennan, 994 F.2d 918, 922 (1st Cir.1993). The test is whether the record contained sufficient evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the government, recognizing that it is the exclusive function of the jury to determine the credibility of witnesses and draw reasonable inferences. United States v. Douglas, 874 F.2d 1145, 1155 (7th Cir.), cert. Denied, 493 U.S. 841, 110 S. Ct. 126, 107 L.Ed. 2d 87 (1989). The defendant "bears a heavy burden on appeal, as he must demonstrate that no rational trier of fact could decide beyond a reasonable doubt that he was not entrapped." United States v. Cervante, 958 F. 2d 175, 178 (7th Cir. 1992). "Only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." United States v. Whaley, 830 F. 2d 1469, 1473 (7th Cir. 1987), cert. Denied, 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 202 (1988); United States v. Atterson, 926 F. 2d 649, 655 (7th Cir.), cert. Denied, 501 U.S. 1259, 111 S. Ct. 2909, 115 L. Ed.2d 1072 (1991).

[4][5][6][7] In entrapment cases, the government must prove beyond a reasonable doubt that a defendant who raises a colorable defense of entrapment, as Ghanayem did, has not in fact been entrapped. United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir.1994) (en banc) (citing Jacobson v. United States, 503 U.S. 540, 547-49, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992)). The defense of entrapment consists of two elements: (1) government inducement of the crime; and (2) a lack of predisposition on the part of the defendant to engage in criminal conduct. Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 886-87, 99 L.Ed.2d 54 (1988); United States v. Gootee, 34 F.3d 475, 477 (7th Cir. 1994); United States v. Johnson, 32 F.3d

304, 307 (7th Cir.1994). The lack of predisposition is the principal element in the entrapment defense. Johnson, 32 F.3d at 307 (citing United States v. Russell, 411 U.S. 423, 433, 93 S.Ct. 1637, 1643, 36 L.Ed.2D 366 (1973); United States v., Evans, 924 F.2d 714, 717 (7th Cir.1991)). Moreover, once the defendant presents sufficient evidence tending to show that the government induced him to break the law, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was disposed to commit the crime prior to being approached by government agents. Jacobson, 503 U.S. at 547-49, 112 S.Ct. At 1540; United States v. Ellis, 23 F.3d 1268, 1272 (7th Cir.1994); United States v. Groll, 992 F.2d 755, 759 (7th Cir.1993). (FN3)

[8][9] "Predisposition focuses on whether the defendant was an unwary innocent or, instead, an unwary criminal who readily avails himself of the opportunity to perpetrate the crime." Johnson, 32 F.3d at 307 (quoting Mathews, 485 U.S. at 63, 108 S.Ct. at 886-87) (internal quotations omitted). This Court looks to five factors to determine whether the defendant had the predisposition to commit the charged offense: (1) the character or reputation of the defendant; (2) whether the suggestion of criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for a profit; (4) whether the defendant evidenced a reluctance to commit the offense, overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. Johnson, 32 F.3d at 307, n. 5 (citing United States v. Haddad, 976 F.2d 1088, 1095 (7th Cir.1992)); Hollingsworth, 27 F.3d at 1205 n. 1 (Coffey, J., dissenting); United States v. Gonzalez, 19 F.3d 1169, 1172 (7th Cir.1994); United States v. Santiago-Godinez, 12 F.3d 722, 728 (7th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1630, 128 L.Ed.2d 354 (1994). The most important factor is whether the defendant exhibited a reluctance to commit the offense that government agents overcame.

Johnson, 32 F.3d at 307 n. 5 (citing Santiago-Godinez, 12 F.3d at 728).

"Generally ... the question of entrapment is one for the jury, rather than for the court." Johnson, 32 F. 3d at 307. Although Fed.R.Crim.P. 29 permits a court to direct a verdict of acquittal where there is "no evidence" from which a jury could find guilt beyond a reasonable doubt, see Whaley, 830 F.2d at 1473, in cases where there is at least some evidence in the record, it is for the jury to decide questions of fact, to weigh conflicting testimony, to draw reasonable inferences from the evidence and to make credibility determinations. The jury must examine the evidence as a whole (including trial testimony and tape recordings), assess its weight and reliability, and resolve contradictions in favor of either side. This is especially true in the entrapment context, for whether "entrapment occurred is a factual issue; 'the defense ... is intertwined with the issue of intent and is often based on credibility determinations, which are traditionally reserved for jury resolution.'" Johnson, 32 F.3d at 307 (quoting Santiago-Godinez, 12 F.3d at 727).

The district court, however, concluded that the evidence introduced at trial established beyond a reasonable doubt, as a matter of law, that the government had entrapped Ghanayem. In granting Ghanayem's Rule 29 motion, the district court stated:

> Taking [Grant's] testimony in a vacuum, the jury was presented with sufficient evidence upon which to find that Ghanayem was predisposed to arrange a cocaine deal. However, the testimony of agent Grant and Ghanayem must be considered together with the unimpeached taped recorded conversations introduced by the government. These tapes, which the government introduced as authentic representations of later recorded conversations, effectively undercut the weight and reliability of agent Grant's testimony about Ghanayem's behavior at the earlier

> meetings. In light of the tapes, the government's evidence was insufficient to support a finding of predisposition.

845 F.Supp. at 561. In reaching this conclusion, the district court examined the government's predisposition evidence. It first determined that the government had presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense, or that Ghanayem had anything to do with illegal drug trafficking. Second, the court found that the government had initiated negotiations with Ghanayem. The court then examined the government's other evidence, including the taped conversations between Ghanayem and Grant, and concluded that the government had not presented sufficient circumstantial evidence to support a finding of Ghanayem's predisposition. Id. at 562-63. We disagree.

The district court relied heavily on what it considered conflicting testimony regarding Ghanayem's responses to Grant's contact with him. The court determined that the tape conversations introduced by the government not only showed Ghanayem as unwilling to participate (FN4) but also showed Grant's testimony to be of "questionable reliability and accuracy." (FN5)

Examining all the evidence in the record in the light most favorable to the government, we conclude that the government presented sufficient evidence to permit a jury to determine beyond a reasonable doubt that Ghanayem had the requisite predisposition. By reason of Ghanayem's previous experiences and acquaintances, it is "likely that if the government had not induced him to commit the crime, some criminal would have done so." Hollingsworth, 27 F.3d at 1200. We reach this conclusion on the basis of the five factor test this Court follows.

First, the government proffered evidence that Ghanayem's character and reputation predisposed him to being involved in a

drug transaction. The district court concluded that "[t]he government presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense." 845 F.Supp. at 559. A review of the trial record, however, leads us to a different conclusion. Although Ghanayem had no previous cocaine-related offenses, Agent Grant testified that Ghanayem had a previous marijuana conviction. (FN6) Furthermore, Ghanayem used terminology that indicated he was experienced in the drug trade. See Johnson, 32 F. 3d at 308; Cervantes, 958 examining character and reputation); United States v. Rivera-Espinoza, 905 F.2d 156, 158 (7th Cir.1990) (defendant's use of drug business terms of art evidence his knowledge of the drug trade). Ghanayam also showed his awareness of the usual course of dealings in drug transactions. On May 20, 1993, Ghanayem informed Grant that although he did not want to participate directly in the negotiations between Grant and Shunnarah, he wanted Grant to add $1,000 to the price of each kilogram of cocaine sold (which Grant would pass along to Ghanayem as a finder's fee). This insistence on $1,000 per kilogram sold to Shunnarah indicates that Ghanayem was aware of the range for a broker's fee for bringing together a supplier and distributor of cocaine. See Santiago-Godinez, 12 F.3d at 729-30 ($2,000 per kilogram fee is not extraordinary). He thus indicated his "sophistication and knowledge of the drug business," United States v. Perez-Leon, 757 F.2d 866, 872 (7th Cir.), cert. denied, 474 U.S. 832, 106 S.Ct. 99, 88 L.Ed.2d 80 (1985); United States V. Beverly, 913 F.2d 337, 355 (7th Cir.1990), cert. denied, 498; U.S. 1052, 111 S.Ct. 766, 112 L.Ed.2d 786 (1991), and "demonstrated that [he] was 'not unfamiliar with the business for which [he] was convicted by using terms of art." Beverly, 913 F.2d at 355 (internal punctuation omitted).

[10] The second factor is not in dispute. The government concedes that on April 22, 1993, it approached Ghanayem, made the initial contact and suggested the drug deal. While this factor does support Ghanayem's case, "mere solicitation by a government agent is insufficient to establish entrapment." Johnson, 32 F.3d at

308; Cervante, 958 F.2d at 179; United States v. Blackman, 950 F.2d 420, 424 (7th Cir. 1991); Perez-Leon, 757 F. 2d at 872.

The third factor favors the government in that the record reflects that Ghanayem engaged in criminal activity for a profit. In fact, it appears that the singular purpose of Ghanayem's involvement in the drug transaction was to profit. Grant testified that from the outset, Ghanayem maintained a "what's-in-it-for me" attitude and insisted on his piece of the action. As discussed above, Ghanayem wanted $1,000 per kilogram of cocaine as a profit on sales to Shunnarah. Record testimony also indicates that Ghanayem repeatedly stressed the importance of the $1,000 and wanted to prevent any direct contact between him (Ghanayem) and Shunnarah in order to insure he received this broker's fee. Viewing the evidence in the light most favorable to the government, we recognize that a jury could reasonably have concluded that "a person who operates in a chain of cocaine distribution does not do so at a financial loss," Beverly, 913 F.2d at 356; Perez-Leon, 757 F.2d at 872, and that Ghanayem sought to profit from the drug transaction.

The fourth, and most important factor, also favors the government. It was reasonable for the jury to conclude that the defendant did not express reluctance which government persuasion overcame. While Ghanayem maintains that he informed Grant that he did not buy, sell or deal in drugs, Grant testified that Ghanayem did not express any reluctance at becoming involved and serving as a middleman. Furthermore, the record is void of any evidence that Ghanayem was cajoled into the conspiracy. Rather, Grant approached Ghanayem with the opportunity not only to provide Shunnarah with a source of cocaine, but also to make a considerable profit (for minimal effort). Grant's testimony concerning his contacts with Ghanayem demonstrates that Ghanayem was willing and eager to participate in a drug transaction and, with the exception of Ghanayem's own testimony,

the record is devoid of any evidence suggesting that Ghanayem was reluctant to participate.

Ghanayem remained an enthusiastic and active participant in the conspiracy. Through the course of the dealings, Ghanayem did not abandon the transaction when it encountered trouble spots; to the contrary, Ghanayem expressed his willingness to pursue the transaction. On May 7, 1993, Ghanayem informed Grant that he could not reach his contact, but that he would continue to try to reach him that evening. On May 12, when Grant inquired as to when Ghanayem's contact would be ready, Ghanayem told Grant that he would find out right away. On May 17, Ghanayem told Grant that although he had been unable to reach his contact, he would continue his communication efforts. Again, on May 19, Ghanayem noted his difficulty in reaching his contact but reassured Grant that he would try to call him later.

Once the transaction was off and running, Ghanayem expressed in his numerous meetings with Grant neither reluctance at being involved nor the desire to get out. On May 20, Ghanayem drove around with Grant and Shunnarah, working out the details of the transaction. He was directly involved in setting up the time and place for the deal to be fully completed. On May 21, even after Grant had direct contact with Shunnarah, Ghanayem was instrumental in attempting to complete the deal. On May 23, Ghanayem again was the pivotal figure in setting up each aspect of the deal. He remained in constant contact with Grant and, with Shunnarah, communicated with Theodosopoulos. Ghanayem was present in the Chicago Billiard's parking lot when the cocaine for money transaction was to occur and when Theodosopoulos flashed the money at Grant.

Fifth, the nature of the government's inducement and persuasion do not support Ghanayem's entrapment theory. The government did not threaten, intimidate or coerce Ghanayem. They did not spend over two years pressuring him into this

transaction, as in Jacobson, nor a year, as in Hollingsworth. Rather, the government's interaction with Ghanayem merely stretched over the course of three months and nine meetings. The government did not offer any special inducements or promises to Ghanayem. Although Ghanayem contends that the legitimate car repair transaction created pressure on him to continue a relationship with Grant, when viewed in light of his $1,000 per kilogram profit, it was reasonable for the jury to conclude that this was not actually a coercive factor. Ghanayem stood to make at least $5,000 ($1,000 for each of 5 kilograms) for the cocaine--a far greater profit than he would net from the car repairs. Finally, even if we were to credit Ghanayem's testimony, the $450 was not overly large, and "[w]hen a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates a predisposition to commit the type of crime involved." Evans, 924 F.2d at 718; see Cervante, 958 F.2d at 180.

Thus, it was reasonable for the jury to have concluded that Ghanayem was in a "position without the government's help to become involved in illegal activity." Hollingsworth, 27 F.3d at 1200. Although Ghanayem may not have otherwise become involved in the drug conspiracy at that particular moment in time, the government sufficiently proved that he was predisposed to commit the crime at some point. In this case, the government's involvement may have affected the timing of the offense; it did not force the offense. Based on our review of the record, and in light of the five factors discussed above, we conclude that there was more than enough evidence to support the jury's conclusion that Ghanayem was predisposed to conspire to possess with the intent to distribute cocaine and, as such, was not entrapped. "We will not disturb the jury's credibility determinations unless it credits exceedingly improbable testimony," Cervante, 958 F.2d at 108 (citing United States v. Jones, 950 F.2d 1309, 1315 (7th Cir.1991), cert. denied, 503 U.S. 996, 112 S.Ct. 1700, 118 L.Ed.2d 410 (1992); United States v. Cardona-Rivera, 904 F.2d 1149, 1152-53 (7th Cir. 1990)), and such is not the case here.

B.

[11] Ghanayem also argues that the district court erred in denying his motion for a new trial. He contends that he was entitled to a new trial based upon newly discovered evidence which demonstrates that he was not predisposed to commit the crime. Specifically, Ghanayem maintains that after the trial, Mazen Shunnarah would have provided testimony, previously unavailable, which would have exculpated Ghanayem.

The government brought Shunnarah to the Northern District of Illinois under subpoena. In Shunnarah's initial interview with the government, he admitted that he had attempted to purchase the five kilograms of cocaine from Grant, that Ghanayem had arranged the contact, that Ghanayem was to receive a percentage of the profits, and that Theodosopoulos was providing a portion of the purchase money. Closer to the trial date, Shunnarah changed his story and withdrew his statements regarding Theodosopoulos's involvement. Because of these differing stories, the government did not call Shunnarah as a witness. Ghanayem did call Shunnarah as part of his defense. Although Shunnarah had already pled guilty in Lexington, he had not yet been sentenced. Shunnarah thus refused to testify, exercising his Fifth Amendment right against self incrimination.

We will reverse a district court's denial of a motion for a new trial based on newly discovered evidence only if the district court has abused its discretion. Gootee, 34 F.3d at 479; United States v. DePriest, 6 F.3d 1201, 1216 (7th Cir.1993). "We approach such motions with great caution and are wary of second-guessing the determinations of both judge and jury." DePriest, 6 F.3d at 1216; United States v. Kamel, 965 F.2d 484, 490 (7th Cir.1992).

[12] Rule 33 of the Federal Rules of Criminal Procedure provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interests of justice." To justify a new trial based on newly discovered evidence, Ghanayem must satisfy a stringent multi-stage test. United States v. Young, 20 F.3d 758, 763 (7th Cir.1994). He must show that the evidence: (1) came to his knowledge only after trial; (2) could not have been discovered sooner through the exercise of due diligence; (3) is material, and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a new trial. Gootee, 34 F.3d at 479; DePriest, 6 F.3d at 1216-17.

Ghanayem fails to satisfy either of the first two prongs. (FN7) First, Ghanayem has not established that the evidence came to his knowledge only after trial. To the contrary, Ghanayem and his counsel knew during trial the substance of Shunnarah's testimony. Prior to the commencement of trial, defense counsel interviewed Shunnarah. At trial, counsel for Ghanayem explicitly stated that "when [Shunnarah] took the stand he would have said that Shunnarah [sic Ghanayem] had nothing to do with the deal, that Chris [Theodosopoulos] had nothing to do with the deal, that he was doing the deal with Grant himself.... I interviewed Mr. Shunnarah.... he told us those things." See United States v. Ellison, 557 F.2d 128, 133 (7th Cir.) ("the facts alleged in support of a motion for a new trial were within the defendant's knowledge at the time of trial" and therefore not newly discovered), cert. denied, --- U.S. ----, 113 S.Ct. 332, 121 L.Ed.2d 250 (1992). Other courts have also held that this kind of post-trial testimony does not qualify as newly discovered evidence. See United States v. Dale, 991 F.2d.819, 838 (D.C. Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 650, 126 L.Ed.2d 607 (1993); United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 258, 121 L.Ed.2d 189 (1992); United States v. Munoz, 957 F.2d 171, 173 (5th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 332, 121 L.Ed.2d 250 (1992); Blissett v. LeFevre, 924 F.2d 434, 441 & n. 1 (2d Cir.), cert. denied, 502 U.S. 852, 112 S.Ct. 158, 116

L.Ed.2d 128 (1991); United States v. Lockett, 919 F.2d 585, 591 (9th Cir.1990).

Ghanayem also fails to meet the second prong of the test. In order to satisfy this element, Ghanayem would have to show that he could not have discovered the relevant evidence despite the exercise of due diligence. Kamel, 965 F. 2d at 492-93. Even if we assume (however unlikely it may be) that Ghanayem had no knowledge of Shunnarah's potential testimony, Ghanayem cannot demonstrate that he exercised the requisite "due diligence." He took no steps to secure Shunnarah's testimony. Rather, Ghanayem chose another strategy: give a missing witness instruction and then argue forcefully to the jury the substance of Shunnarah's missing testimony. That Ghanayem's trial tactics failed is not grounds for a new trial. As a result, the district court did not abuse its discretion in denying Ghanayem's motion for a new trial. (FN8)

III. Christ Theosodopoulos

[13] In appealing the district court's directed judgment of acquittal of Theodosopoulos, the government contends that the evidence introduced at trial was sufficient to support a rational jury's conclusion that beyond a reasonable doubt Theodosopoulos conspired to possess cocaine with the intent to distribute it. In granting Theodosopoulos's motion for a judgment of acquittal, the district court concluded:

> I find the evidence is insufficient to establish beyond a reasonable doubt that Mr. Theodosopoulos was part of the drug conspiracy that is alleged at the indictment... [A]t the close of the government's case... I expressed specific concerns about the lack of evidence as to Mr. Theodosopoulos and the difficulty I had even with respect to drawing all reasonable inferences in the government's favor after the government rested.

> I was concerned about the sparsity of the evidence and the equivocal nature of the evidence... I am convinced that a rational jury could not convict Christ Theosodopoulos of Count I of the indictment beyond a reasonable doubt.

The government first argues that the evidence established the existence of a cocaine conspiracy. Second, the government maintains that Theodosopoulos was knowing member of that conspiracy who participated in and intended to advance the ends of that conspiracy.

[14][15] In examining a sufficiency of the evidence claim, we review the record in the light most favorable to the government, and determine whether "any rational tried of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct 2781,2784, 61 L.Ed.2d 560 (1979) (emphasis in original); *United States v. Billops*, 43 F.3d 281 (7th Cir. 1994); *United States v. Howell*, 37 F.3d 1197, 1201 (7th Cir.1994); *United States v. Byerley*, 999 F.2d 231, 234 (7th Cir. 1993). When reviewing the conviction, we may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *United States v. Baskin-Bey*, 45 F.3d 200 (7th Cir. 1995); *United States v. Durrive*, 902 F.2d 1221, 1229 (7th Cir. 1990). A jury conviction should be taken away "only when the record contains no evidence, regardless of how it is weighed from which the jury could find guilt beyond a reasonable doubt." *United States v. Rosaez-Cortez*, 19 F.3d 1210, 1215 (7th Cir. 1994).

[16.] To prove Theodosopoulos guilty of drug conspiracy, the government must prove beyond a reasonable doubt: (1) a conspiracy existed; (2) Theodosopoulos knew of the conspiratorial agreement; and (3) Theosodopoulos intended to join it. *United States v. James*, 40 F.3d 850, 864 (7th Cir. 1994), *cert. denied*, --- U.S.---, 115 S.Ct. 948, 130 L.Ed. 2d 891 (1995); *United States v. Crowder*, 36 F.3d 691, 695 (7th Cir. 1994) ("To sustain a

conspiracy charge, the government need only prove the existence of the conspiracy and participatory link with the defendant.") (quoting *United States v. Blas*, 947 F.2d 1320, 1325 (7th Cir. 1991), *cert. denied*, 502 U.S. 1118, 112 S.Ct. 1234, 117 L.Ed.2d 468 (1992)); *cert. denied*, ---U.S.---, 115 St.Ct.1160, 130 L.Ed.2d 1116 (1995); *United States v. Campbell*, 985 F.2d 341, 344-45 (7th Cir. 1993).

Without question, there is adequate evidence in the record that a cocaine conspiracy existed. Indeed, the district court did not conclude otherwise; rather the court entered a judgment of acquittal for Theodosopoulos because of the lack of evidence that he was part of that conspiracy. Neither party has appealed the finding of a conspiracy and we thus accept it.

[17][18][19] The record contained sufficient evidence for the jury to find that Theodosopoulos was a knowing member of the conspiracy. (FN9) To prove that a particular defendant was a member of an ongoing conspiracy, the government must present "substantial evidence that [the] defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." *James*, 40 F.3d at 865 (quoting *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 357, 121 L.Ed.2d 270 (1992)). Although the jury may not rest its verdict solely by piling inference upon inference, *United States v. Martinez*, 937 F.2d 299, 304 (7th Cir.1991), the government may prove Theodosopoulos's participatory link to the conspiracy solely by way the circumstantial evidence. *United States v. Townsend*, 924 F.2d 1385, 1390 (7th Cir.1991). Thus, while mere presence is not enough by itself to convict a defendant, see *United States v. Cochran*, 955 F.2d 1116, 1123 (7th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 460, 121 L.Ed.2d 368 (1992), this presence, along with other evidence indicating that the presence or act was intended to advance the ends of the conspiracy, suffices. See *United States v. Carson*, 9 F.3d 576, 587 (7th Cir.1993), cert. denied, --- U.S. ----, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994);

Cochran, 955 F.2d at 1123 ("[p]resence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy"); *United States v. Simone*, 931 F.2d 1186, 1193 (7th Cir.), cert. denied, 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991).

Theodosopoulos's presence at the automobile body shop garage on May 20, 1993, at the time set for the first planned exchange of money and cocaine, supports the government's contention that the defendant was a knowing member and active participant in the conspiracy. Grant testified that the meeting at the garage on May 20 took place so that the individual with the money could observe the cocaine and then pay the undercover agent $21,000 for one kilogram of cocaine. It was reasonable for the jury to infer that Theodosopoulos--and not Shunnarah-- was the "money man" in that although Shunnarah examined the cocaine in the Plush Pup parking lot; he did not complete the transaction at that time and rather, insisted that the transaction be completed at the automobile shop. See *United States v. Hernandez*, 948 F.2d 316, 321 (7th Cir.1991).

The government also points to Theodosopoulos's presence on two separate occasions on May 23, 1993, that demonstrate his participation in the conspiracy. The government proffered evidence that Theodosopoulos met and spoke with Ghanayem and Shunnarah in the alley behind Theodosopoulos's residence just moments after the two left to meet with their "money man" and just prior to Shunnarah's planned meeting with the undercover agent to give him the money. Grant and Shunnarah had decided to complete the drug deal on this day. It was reasonable for the jury to infer from the circumstances that since neither Ghanayem nor Shunnarah had money themselves, they were attempting to obtain purchase money elsewhere, such as from Theodosopoulos.

The government also argues that Theodosopoulos's presence in the parking lot on May 23, 1993, and his subsequent

waving of money at Grant, further establish his participation in the conspiracy. Although "mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish ... participation," *Durrive*, 902 F.2d at 1225, a "defendant's presence at the scene where coconspirators acted in furtherance of the conspiracy's ultimate objective is a probative factor which may be considered with other factors in assessing the sufficiency of the evidence." *James*, 40 F.3d at 865 (citing *Burrell*, 963 F.2d at 988). Had Theodosopoulos simply been driving by the drug transaction--coincidentally in the wrong place at the wrong time--this would not be enough to establish his link to the conspiracy. However, at the exact moment in the transaction when the "money-man" would show the money to the supplier, Theodosopoulos stopped his car in front of Grant, Ghanayem and Shunnarah, and purposefully waived a handful of currency at them. It was entirely reasonable for the jury to conclude that the display of money was intended to advance the ends of the conspiracy by showing the suppliers that the money was present and the narcotics deal was about to be completed. The mere fortuitous presence at the scene where a crime takes place does not prove participation in the conspiracy, but the presence of the defendant at critical junctures, such as these, alone can establish a defendant's participation. See *United States v. Pazos*, 993 F.2d 136 (7th Cir.1993); *Burrell*, 963 F.2d at 990-91; *Cochran*, 955 F.2d at 1122.

Theodosopoulos argues that Grant's testimony that Theodosopoulos, while in the gray car, drove by Grant, Shunnarah and Ghanayem in the parking lot and flashed the money indicates that, if anything, Theodosopoulos did not intend to be part of any drug transaction. He argues that if he had intended to be a participant, he would have remained rather than left. The existence of an alternative explanation for Theodosopoulos's actions does not sink the government's case. "The fact that the government's evidence might also be consistent with an alternate theory is irrelevant; the law does not require the government to disprove every conceivable hypothesis of innocence to sustain a

conviction on an indictment proved beyond a reasonable doubt." *Townsend*, 924 F.2d at 1389 (citations omitted) (emphasis in original).

The government also introduced telephone records that established circumstantially that Shunnarah and Theodosopoulos had several conversations around the time of the planned money-for-cocaine exchange. Viewing this evidence in the light most favorable to the government, it was reasonable for a jury to conclude that the timing and circumstances surrounding the placing of these calls established that Shunnarah and Theodosopoulos were in contact at this time. On May 23, 1993, two one-minute calls--at 11:46 a.m. and 12:13 p.m.--were made from Ghanayem's cellular telephone (which was with Shunnarah at the time) to Theodosopoulos's residence. At 12:30 p.m., a single call was made from Theodosopoulos's home to Ghanayem's cellular phone. While the telephone calls by themselves are not dispositive, their timing is quite probative. All three calls took place immediately after Shunnarah spoke with Grant and informed him that they were still waiting for their money source (11:35 a.m.) and before Shunnarah contacted Grant to tell him that they were now ready to complete the drug transaction. (1:10 p.m.). Furthermore, it was immediately after the 12:13 telephone calls that the two defendants had contacted each other and had done so for the purposes of further the criminal conspiracy. See *United States v. Hirschberg*, 988 F.2d 1509, 1516 (7th Cir.), cert. denied, ---- U.S. ----, 114 S.Ct. 311, 126 L.Ed.2d 258 (1993); *Burrell*, 963 F.2d at 991; *Hernandez*, 948 F.2d at 321.

Theodosopoulos argues that the absence of records of telephone calls--for example, between the Theodosopoulos residence and Lexington--undermines the relevance of the existence of the phone records on the date and around the time of the proposed money-for-cocaine exchange. The jury, however, had the opportunity to consider this evidence at trial and weigh its importance, and was reasonable in ultimately concluding that

Theodosopoulos participated in the conspiracy.

[20] We recognize that the government's case was built in large part on circumstantial evidence, as is often true in conspiracy cases. It is also possible that we may have reached a different result if we had sat as jurors. However, "the mere existence of other possible hypotheses is not enough to remove the case from the jury." *United States v. Duarte*, 1 F.3d 644, 650 (7th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994). As we have cautioned before, Rule 29 is not a device to replace jury findings with the conclusions of district court judges. Id. We will only take a conviction away from a jury on sufficiency grounds when the government has offered no evidence from which a jury could conclude beyond a reasonable doubt that crime had been committed. *Atterson*, 926 F.2d at 655 ("We must affirm unless the record is barren of any evidence, regardless of its weight, from which the trier of fact could find guilt beyond a reasonable doubt."). Here, there was enough evidence, albeit circumstantial, for a reasonable jury to conclude beyond a reasonable doubt that a conspiracy did exist and Theodosopoulos was a knowing and active participant in it.

For the foregoing reasons, we REVERSE the district court's judgments of acquittal, AFFIRM the denial of Ghanayem's new trial motion, reinstate the jury verdicts, and REMAND for sentencing.

FN* The Honorable James C. Paine, of the United States District Court for the Southern District of Florida, sitting by designation.

FN1. The individual who whom Grant pointed subsequently was identified as co-defendant Christ Theodosopoulos.

FN2. Ghanayem testified to an entirely different version of the events. He testified that on May 23, Grant again proposed the cocaine deal, to which Ghanayem responded: "I don't

do drugs, I don't want any drugs, don't bring no drugs by my business and I wasn't involved in any drugs."

FN3. We also note that where there is sufficient evidence that a defendant is predisposed to commit the crime, we do not need to inquire into government inducement. *Johnson*, 32 F.3d at 308.

FN4. Agent Grant testified that during the meeting on May 7, Ghanayem accepted Grant's offer to arrange a drug transaction. The district court points to several moments in the taped conversation which, the court opines, indicate Ghanayem's reluctance to engage in the transaction. First, in response to Grant's inquiry about Ghanayem's contact with Shunnarah, Ghanayem stated: "He never called me, I was wanting a ... wasn't able to get a hold of me, he couldn't get a hold of it." Later, when asked if he knew anyone else who might be interested in purchasing drugs, Ghanayem replied: "Not off hand only one person. You ... this is the one person that I know that, you know, he's a he's a close friend of mine...." The district court indicates that Ghanayem's stammering responses reflect a confused and ambivalent person reluctant to be involved in the cocaine deal, rather than the reactions of an experienced drug dealer.

FN5. The district court, in a footnote, contends that it is not weighing the testimony, which it admits is a jury function, but rather is concluding that the government did not present sufficient evidence to establish predisposition.

FN6. The district court noted that Grant had given "unsubstantiated" testimony that Ghanayem had a prior marijuana possession arrest. 845 F.Supp. at 559 n. 2. Agent Grant actually testified that, although he was uncertain as the specifics, Ghanayem had a previous

marijuana conviction.

FN7. Although Ghanayem's failure to satisfy any of the prongs precludes his obtaining a new trial, we nonetheless discuss his failure to satisfy the first two. We do not address whether Shunnarah's testimony was material and exculpatory nor whether it would probably lead to an acquittal in the event of a retrial.

FN8. The government contends that Ghanayem waived any argument based on newly discovered evidence. Everything that the government identifies as waiver is more appropriately addressed under the "due diligence" prong of the test. See *Kamel*, 965 F.2d at 493.

FN9. We reach this conclusion without relying on the co-conspirator statements of Ghanayem and Shunnarah and therefore do not address the government's contention that the district court erred in excluding such evidence under Federal Rule of Evidence 801 (d) (2) (E).

THE COURT: Shunnarah. I mean, he certainly was merely present in some suspicious places, but there wasn't any evidence to suggest that he knew the scope or the amount there was. According to the Seventh Circuit opinion and according to my recollection of the evidence, the most serious item was the agent's observation of what he thought was money being flashed by Mr. Theodosopoulos as he drove out of the parking lot. Again, is that probative of his knowledge of what was going on in terms of how much was being negotiated and what was being negotiated and what the terms and conditions were? I think we are left in a position of speculation and not proof by a preponderance of the evidence.

So I will apply the four-point reduction form minimal role under 3B1.2, Subsection A, with a base offense-level of a 28. That would give us an adjusted base offense level of 24 and a sentencing guideline range of 51 to 63 months. Is that correct?

MR. CIARDELLI: That's correct, your Honor.

With that, I would have nothing further to add, then.

THE COURT: And with the statutory mandatory minimum of 60 months. That means we actually have a guideline range of 60 to 63 months, not really 51.

Mr. Theodosopoulos would you like to speak on you own behalf?

THE DEFENDANT: No, I wouldn't, your Honor.

THE COURT: All right. On behalf of the government, would you like to address any issues?

MR. KAPLAN: Judge, No. We would incorporate the information we have provided to your Honor in the report and the other documents in this case and we would have nothing further at this time.

THE COURT: Is there anything anyone else wants to add?

MR. CIARDELLI: I don't believe so, your Honor.

THE COURT: Is there any reason why sentence cannot be imposed at this time?

MR. CIARDELLI: No, your Honor.

THE COURT: With an adjusted offense level of 24, a criminal history category of a 1, and a mandatory minimum of 60 months, my window of discretion in this case is to impose a sentence between 60 months and 63 months. Given Mr. Theodosopoulos's personal circumstances, equivocal and insubstantial nature of the evidence in the case, the Seventh Circuit opinion notwithstanding, I feel compelled to sentence him at the lowest possible point in the guideline range, which is 60 months.

I suppose in your background, Mr. Theodosopoulos, there are a few things that concern me. One is the sporadic nature of your employment history. And if you and Mr. Ciardelli concur, I would recommend that you be placed in...

BEST AV

AO 245B (Rev. 4/93 Sheet 1 - Judgment in a Criminal Case)

United States District Court

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA
V.
CHRIST THEODOSOPOULOS
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 93 CR 510-2

Victor F. Ciardelli
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____
☑ was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	knowpiracy to possess with the intent to distribute kilogram quantities of cocaine	05/23/93	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☑ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) one, which shall be due ☐ immediately ☒ as follows: as determined by the Probation Department.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 341-66-9724

Defendant's Date of Birth: 05/02/69

Defendant's Mailing Address:
6942 W. WELLINGTON
CHICAGO, IL 60634

Defendant's Residence Address:

AUGUST 22, 1995
Date of Imposition of Sentence

Signature of Judicial Officer

SUZANNE B. CONLON, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

AUGUST 23, 1995
Date

AILABLE COPY

Defendant: CHRIST THEODOSOPOULOS
Case Number: 93 CR 510-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS.

Defendant shall obtain his GED during his term of imprisonment or while on supervised release.

☒ The court makes the following recommendations to the Bureau of Prisons:

that defendant be placed at the Oxford facility. It is further recommended that defendant be enrolled in a vocational training program.

☐ The defendant is remanded to the custody of the United States marshal.
☒ The defendant shall surrender to the United States marshal for this district.
☒ at 10:00 a.m. p.m. on October 3, 1995
☐ as notified by the United States marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

BEST AVAI

Defendant: CHRIST THEODOSOPOULOS
Case Number: 93 CR 310-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FOUR (4) (YEARS).

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ABLE COPY

Defendant: CHRIST THEODOUOPOULOS
Case Number: 93 CR 510-2

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See attached order regarding minimal role.

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: I

Imprisonment Range: 51 to 63 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 12,500.00 to $7,000,000.00

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

BEST AVAILA

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

Date: February 28, 1996

BEFORE: **Honorable** Joel M. Flaum, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

Honorable James C. Paine, District Judge*

No. 95-3115

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

CHRIST THEODOSOPOULOS,
Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 93 CR 510, Suzanne Conlon, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on February 27, 1996.

---

* Honorable James C. Paine of the Southern District of Florida, sitting by designation.

(1061-110393)

BLE COPY